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In the

Supreme Court of the United States

October Term, 1980

No. .....

CASPAR W. WEINBERGER,
Secretary of Defense, et al.,
Petitioners,

—v.—

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, particularly in light of Department of Defense (DOD) regulations mandating compliance with the requirements of the National Environmental Policy Act (NEPA) even where information involved may be classified, the United States Court of Appeals was correct in ruling that the Navy must comply with NEPA and prepare an Environmental Impact Statement (EIS) in connection with its plan to store nuclear weapons in close proximity to the Honolulu International Airport and two military airports.

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Cases:

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Statutes and Regulations:

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Department of Defense Regulation, 32 C.F.R. §214.8(i). 2, 10, 11

Department of Defense Regulation 5200.1-R, Information Security Program Regulation, July 15, 1972, 32 FR 159 . . . . . 2, 9

Other:

Department of Defense Directive, Security Criteria and Standards for Protecting Nuclear Weapons, July 30, 1974, No. 521041. 20

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ADDITIONAL REGULATIONS INVOLVED

Department of Defense Regulation

32 C.F.R. §214.8(i):

> The fact that a proposed action is of a classified nature does not relieve the proponent of the action from complying with the requirement of this Part. Environmental statements, both draft and final, shall be prepared, safeguarded, and disseminated in accordance with the requirements applicable to classified information, DOD Regulation 5200.1-R, Information Security Program Regulation, July 15, 1972, 32 FT 159. When feasible, these statements shall be organized in such a manner that classified portions can be included as annexes, so that the unclassified portions can be made available to the public.

Council on Environmental Quality

Regulation

40 C.F.R. §1507.3(c):

> Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable

to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

STATEMENT OF THE CASE

This case concerns the question of whether the Navy must prepare an EIS in connection with its plan to store nuclear weapons one mile from a major flight path to the Honolulu International Airport and adjacent to two smaller military airports.

In 1975, the Navy prepared an Environmental Impact Assessment (EIA) in connection with its plan to transfer weapons then stored at the Waikele branch of the Lualualei Naval Magazine on the Island of Oahu, Hawaii,[1/] to the West Loch branch of the Naval Magazine, adjacent to the three airports.

Noting that weapons had been stored at West Loch since 1959, the EIA concluded

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1/ Substantial evidence in the record, including but not limited to photographs of weapons, indicates that nuclear weapons were being stored at Waikele, P-47-51 (plaintiffs' exhibits at trial); Affidavit of James Albertini, dated March 16, 1978.

that increasing the number of weapons would have no significant impact on the environment, and thus an EIS was not necessary. The EIA did not, however, take into consideration that the existing weapons were conventional, and that the new weapons would include nuclear weapons.

In 1978, the Navy prepared a short Candidate Environmental Impact Statement (CEIS) concerning the general effects of storing nuclear weapons. Although the CEIS mentioned that nuclear "warheads will remain intact when dropped from heights much greater than those normally experienced in actual handling operations,"[2/] it did not consider the potential implication of storing nuclear weapons in close proximity to airports, or what might occur if a plane crashed into a storage bunker

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2/ Petition for Certiorari, hereinafter Petition, p. 32a.

containing one or more nuclear weapons. Although the Navy has consistently taken the position that it can neither confirm nor deny the presence of nuclear weapons at West Loch (or anywhere else for that matter), in the course of this litigation, petitioners have stipulated that the new bunkers constructed at West Loch are capable of storing nuclear weapons. As the court below stated: "the public therefore must assume that at least the possibility exists that nuclear weapons . . . will be stored at West Loch." Petition, p. 5a. Nonetheless, petitioners have failed to examine the following questions which the court below considered essential to any decision to store nuclear weapons at West Loch:

(1) the risk of nuclear accidents;

(2) the enhancement of that risk by the physical proximity of the airports;

(3) the effects of any nuclear accident upon the surrounding population and environment of Hawaii; and

(4) the effects of continual low-level radiation from the storage of the weapons near populated areas.

Petition, pp. 3a and 5a.

REASONS THE WRIT SHOULD NOT BE GRANTED

1. The Decision Of The Court Below Does Not Constitute Any Departure From Existing Principles Of NEPA Law And Thus Does Not Warrant Review By This Court.

In light of several significant concessions by petitioners, respondents are somewhat puzzled about why the Petition for a Writ of Certiorari has been filed in this case. Petitioners have conceded that their own regulations mandate compliance with NEPA. Those regulations state as follows:

> The fact that a proposed action is of a classified nature does not relieve the proponent of the action from complying with the requirements of this Part. Environmental statements, both draft and final, shall be prepared, safeguarded, and disseminated in accordance with the requirements applicable to classified information, DOD Regulation 5200.1-R, Information Security Program Regulation, July 15, 1972, 32 FR 159. When feasible, these statements shall be organized in such a manner that classified portions can be included as annexes, so

> that the unclassified portions can be made available to the public.

32 C.F.R. §214.8(i) (emphasis supplied); accord 40 C.F.R. §1507.3(c), quoted at Petition, p. 10. Petitioners further concede:

> This regulation applies even to highly classified actions such as the maintenance and storage of nuclear warheads.

Petition, p. 9. Finally, petitioners concede:

> NEPA's overriding mandate that decision makers inform themselves of the environmental consequences of their proposed actions and take those considerations into account can best be served by the filing, where appropriate, of a "real" EIS directed to the Navy's true plans, even if much or all of the statement, is withheld from the public.

Petition, p. 18.

Despite the fact that the decision makers have not informed themselves concerning the greatest and most obvious dangers of storing nuclear weapons at West

Loch, petitioners nonetheless seek to upset the ruling of the Ninth Circuit, which requires them to prepare an EIS, on what amounts to two main contentions: (1) that much of the information that would be contained in the EIS is classified; and (2) that disclosure of this non-classified information would inevitably lead to the revelation of the classified information as well. Petitioners seek to bolster this argument by reciting at length numerous sections of the Atomic Energy Act and DOD regulations concerning classified data. Petition, pp. 1-5, 36a-59a. That recitation, however, does not justify disturbing (and therefore does not justify reviewing) the decision of the court below. For as noted above, DOD regulations themselves make it clear that NEPA must be complied with even where some or even all relevant facts are classified. 32 C.F.R. §214.8(i).

The United States Court of Appeals, in Concerned About Trident v. Rumsfeld, 555 F.2d 817, 823 (D.C.Cir. 1977), squarely rejected the Navy's argument that military actions are exempt from NEPA "under the overused rubric of 'national defense.'" Having failed to exempt themselves from NEPA under one "overused rubric," it appears that the Navy has merely switched to another -- that of "classified information" and "restricted data." The acceptance of petitioners' new rubric and arguments would, however, mean nothing less than the scrapping of their own and the Council on Environmental Quality's (CEQ) regulations. It would, in effect, mean that if some of the material to be included in the EIS were classified, then no EIS would be legally required -- a result which NEPA and the DOD and CEQ regulations was plainly intended to prevent.

Petitioners try to avoid the plain words of their own regulations by claiming that what is at issue here is not whether NEPA (and their own regulations) must be complied with, but "whether the provisions of NEPA relating to the public development, disclosure and dissemination of environmental impact statements invariably must be complied with, even where such compliance is likely to reveal military secrets." Petition, p. 10 (emphasis in original). That, however, is not the question before this Court. For the Ninth Circuit, in its opinion, did not direct, or even address itself to, which portions of the EIS must be made public; it merely ordered the Navy to prepare an EIS -- to consider the dangers, that apparently have never been considered, that might arise from storing nuclear weapons at West Loch.

Once petitioners have prepared the EIS in compliance with NEPA, there may be some dispute between petitioners and respondents and other interested parties concerning whether particular information in the EIS was properly classified. The question of what specific information can and should be available to the public may, therefore, reach the federal courts at some time in the future. Contrary to petitioners' assertions, however, it is not before this Court now. Rather, the question raised by this case is whether petitioners must prepare any EIS in conjunction with the plan to store nuclear weapons at West Loch.

Clearly, petitioners' own regulations answer that question in the affirmative and, therefore, review of the decision of

the court below is both unnecessary and inappropriate.[3/]

II. Considerable Unclassified Information Exists Which Can And Must Be Addressed In Public Portions Of An EIS.

By their lengthy recitation of requirements regarding classified information, petitioners attempt to obscure two facts: first, that several of the questions that must be addressed in the EIS herein turn, at least in part, on unclassified information and, second, that because ours is basically an open society,

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3/ The fact that the court below spoke in terms of a "hypothetical" EIS does not indicate any departure from normal principles of NEPA or DOD regulations. For, in fact, any EIS prepared prior to the effectuation of a project is and should be hypothetical since it is only after a full and adequate EIS is completed that the decision maker is in a position to decide whether to carry out any proposed federal project as planned. Any other course would render NEPA meaningless and would constitute not only an extraordinary waste of scarce government finances, but worse, constitute a total fraud on the public whose elected representatives created NEPA.

there is considerable information concerning nuclear weapons, nuclear accidents, and weapons storage in the public domain.

1. Questions involving unclassified information. The court below directed petitioners to examine the degree to which the physical proximity of airports enhanced the risk of nuclear accident at West Loch. In other words, petitioners must examine, among other things, the likelihood of an airplane crashing into any one of the newly constructed bunkers on takeoff or landing. Despite the fact that an "accident potential zone"[4/] can be calculated, astoundingly, it has never been calculated for the Honolulu International Airport, although it has been proposed by both the State of Hawaii and

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4/ An accident potential zone is "a rough measure of the risk that an airplane will crash on (a) piece of ground" (Tr. p. 27; "Tr." hereinafter refers to the Transcript of Proceedings in District Court which are part of the record in this case).

airport officials (Tr. p. 144), and nuclear weapons may be stored close by. Even petitioners' own classification expert indicated at trial that the numbers or locations of airplane accidents in Hawaii (information essential to the calculation of an accident potential zone) are not classified[5/] (Tr. p. 217). Petitioners' classification expert also indicated that information concerning what would happen to a plane when it hit the ground[6/] (Tr. p. 221), the effects of that crash on the surrounding area (Tr. p. 222), the number of nuclear accidents (Tr. p. 218), the fact of a nuclear accident (Tr. pp. 216, 223), and

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5/ In fact, there have been several accidents in which fully armed military planes have crashed into the ocean in the vicinity of West Loch (P-65, pp. 2-6; P-8, p. 4).

6/ For example, it is public knowledge that when a B-52 and KC-35 collided in mid-air and crashed in Palomares, Spain, two of the four nuclear weapons carried by the B-52 exploded and released radioactive material necessitating cleanup and removal of contaminated soil costing millions of dollars.

factors concerning the dispersal of plutonium (Tr. p. 221),[7] all involve unclassified information. These matters are, of course, exceedingly relevant to other questions to be answered in the EIS: "the risk of nuclear accidents" and "the effects

7/ For example, according to a study done by Lawrence Livermore Laboratories, "the destruction of a bunker containing several nuclear weapons could scatter tiny but measurable amounts of plutonium downwind over a 100 square mile area . . . within that area roughly fifty miles long and two miles wide -- the plutonium contamination of the soil would exceed the plutonium screening level recently proposed by the Environmental Protection Agency as safe for human habitation." Even after clean-up operations, "it would be virtually impossible to render a 100-square mile area completely safe by EPA's proposed plutonium screening level." (P-66, pp. 274-275).

Plutonium is, of course, one of the most toxic substances known (Tr. p. 101). According to petitioners' CEIS concerning the storage of nuclear weapons, "this material will not cause radiological damage to personnel, regardless of one's proximity, if kept outside the body." Petition, p. 32a. However, since plutonium in the air enters the body when we breathe, a witness for respondents stated that the statement in the CEIS constitutes "a cruel deception to the public with respect to a very potent carcinogen" because "it is in fact impossible to keep the plutonium 'outside the body' once it is in the air, water and food supply." (P-30, p. 2).

of any nuclear accidents upon the surrounding population and environment of Hawaii." Petition, p. 3a. Finally, petitioners' classification expert did not indicate any concern that examination of these questions would lead to the revelation of classified information.

2. Information in the public domain concerning nuclear weapons. Furthermore, even though petitioners may wish to keep secret some of the information relevant to the EIS, in fact it is often public knowledge. Petitioners have contended throughout that their regulations prohibit them from confirming or denying the presence of nuclear weapons. Petitioners refuse to recognize, however, that American citizens, particularly in Hawaii, are often aware when nuclear weapons are stored in their community. For regulations concerning the storage of nuclear weapons, which are

publicly available, readily identify the presence of such weapons by such factors as the type of fences, lighting and warning signs which accompany a nuclear storage facility. See, for example, DOD Directive, Security Criteria and Standards for Protecting Nuclear Weapons, July 30, 1974, No. 521041, Exh. I to Affidavit of James Albertini, March 16, 1978.

Petitioners finally seek to avoid their responsibility to fully examine the potential dangers of storing nuclear weapons at West Loch and urge review of the lower court decision by arguing as follows:

> The preparation of hypothetical EIS's for facilities where nuclear warhead storage is in fact contemplated conceivably would not place a significantly greater burden on the Navy than would the preparation of standard EIS's. But the preparation of hypothetical EIS's for facilities where such weapons are not likely to be stored would be expensive, unsettling, controversial, time-consuming and valueless.

Petition, p. 19.

This argument fails for several reasons and, like the arguments which precede it, does not justify review, by this Court, of the decision of the court below.

Firstly, the mandates of NEPA cannot be avoided because compliance therewith would be expensive, controversial or time consuming; second, it is not clear just what would be unsettling or who would be unsettled by the preparation of impact statements concerning the potential storage of nuclear weapons. If nearby residents would be unsettled if the final EIS indicated that such weapons pose a significant danger to their community, that EIS should, and presumably would, cause the decision maker to find a safer storage site.

But, finally, we are not here dealing with just some hypothetical site where nuclear weapons could never be stored, and

the EIS would be prepared for diversionary purposes (see Petition, pp. 18-19). For, as noted above, petitioners have stipulated that the West Loch bunkers, which are so very close to Honolulu International and two other airports, are nuclear capable. As the court below correctly stated:

> The public therefore must assume that at least the possibility exists that nuclear weapons, to the extent of the apparent capacity of the facility, . . . will be stored at West Loch. Thus, an EIS dealing with the consequences of such possibility would reveal nothing with respect to the likelihood of storage of which the public is not already aware.
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> Consideration of the four environmental factors specified by appellants as being critically important is essential if the decision maker is to be adequately prepared when the time for the decision respecting storage arrives.

Petition, p. 5a.

The safety, and possibly even the survival, of the people of Hawaii are at stake

herein. It is for this reason that NEPA places the responsibility of considering all relevant safety factors on the agency proposing a federal project by preparation of an Environmental Impact Statement.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: March 18, 1981

Respectfully submitted,

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